

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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LOUIS VIGNOLA, individually;  
TAMARA HARLESS, as Special  
Administrator for the Estate of NANCY  
MARIE OUELLET; LOUIS VIGNOLA as  
Guardian ad Litem for CAROLYN  
VIGNOLA, a minor; and LOUIS  
VIGNOLA as Guardian ad Litem for  
GABRIEL VIGNOLA, a minor,

Plaintiffs,

v.

CHARLES ALFRED GILMAN, JR.;  
AUTO-OWNERS INSURANCE  
COMPANY; and MUTUAL OF  
ENUMCLAW INSURANCE COMPANY,

Defendants.

2:10-cv-02099-PMP-GWF

ORDER

Presently before the Court is Defendant Mutual of Enumclaw Insurance Company's Motion to Dismiss (Doc. #11), filed on February 7, 2011. Plaintiffs filed a Response (Doc. #14) on February 17, 2011. Defendant Mutual of Enumclaw Insurance Company filed a Reply (Doc. #19) on February 28, 2011.

**I. BACKGROUND**

This case stems from a tragic motorcycle–automobile accident on June 22, 2010. (Notice of Removal (Doc. #1), Ex. A [“Compl.”] at ¶ 7.) Nancy Marie Ouellet (“Ouellet”) was operating her motorcycle on US 93 when Defendant Charles Gilman’s (“Gilman”) automobile struck her motorcycle. (Id.) As a result of the collision, Ouellet suffered serious injuries and died. (Id.) Ouellet maintained a motorcycle insurance policy through

1 Defendant Auto-Owners Insurance Company (“Auto-Owners”). (Id. at ¶ 17.) Defendant  
2 Gilman maintained an automobile insurance policy through Defendant Mutual of  
3 Enumclaw Insurance Company (“Enumclaw”). (Id. at ¶ 37.)

4 Plaintiffs Louis Vignola, Carolyn Vignola, and Gabriel Vignola are Ouellet’s  
5 heirs, and Plaintiff Tamara Harless is the Special Administrator of Ouellet’s estate. (Id. at  
6 ¶¶ 2-3, 8-10.) Plaintiffs filed a claim with Defendant Auto-Owners requesting the policy  
7 limits for under-insured motorist coverage under Ouellet’s insurance policy. (Id. at ¶ 18.)  
8 Additionally, counsel for Plaintiffs sent a demand letter to Defendant Enumclaw requesting  
9 the policy limits for bodily injury coverage under Defendant Gilman’s auto-insurance  
10 policy, however Plaintiffs did not receive payment under the policy. (Id. at ¶¶ 39, 52.)

11 On November 2, 2010, Plaintiffs filed the present Complaint in the Eighth  
12 Judicial District Court of Clark County, Nevada, alleging claims of wrongful death,  
13 negligence, and loss of consortium against Defendant Gilman. (Id. at ¶¶ 11-14.) Plaintiffs’  
14 Complaint alleges Defendant Auto-Owners acted in bad faith by refusing to promptly settle  
15 their claims. (Id. at ¶¶ 18-30.) Additionally, Plaintiffs’ Complaint asserts a bad faith claim  
16 against Defendant Enumclaw for failing to reasonably and promptly settle their claims. (Id.  
17 at ¶ 80.) Plaintiffs’ Complaint also seeks a declaratory judgment that Defendant Enumclaw  
18 is obligated to indemnify Defendant Gilman for any damages awarded to Plaintiffs in  
19 excess of the applicable policy limits. (Id.) Plaintiffs seek damages, payment under the  
20 insurance policies, plus attorney’s fees and costs. (Id.)

21 Defendant Auto-Owners removed the case to this Court on December 2, 2010.  
22 (Notice of Removal (Doc. #1).) Defendant Enumclaw now moves to dismiss Plaintiffs’  
23 claims, arguing Plaintiffs are third party claimants under the insurance policy and thus lack  
24 standing to bring a claim for bad faith refusal to settle. Defendant Enumclaw also argues  
25 Plaintiffs’ request for declaratory relief is not ripe because they have no protectable legal  
26 interest in the insurance contract where they have not first obtained a tort judgment against

1 Defendant Gilman.<sup>1</sup>

2 In response, Plaintiffs ask the Court to recognize a cause of action for third party  
3 bad faith. Additionally, Plaintiffs rely on a recent decision of this Court to argue their  
4 Complaint states an actual case or controversy ripe for declaratory relief. Plaintiffs also  
5 argue their request for declaratory relief is ripe because they have a legally protectable  
6 interest in the liability of Defendant Enumclaw, the limits of Gilman's policy, and the  
7 alleged acts of bad faith.

8 Defendant Enumclaw replies that Plaintiffs have not established the right of third  
9 parties to file claims for bad faith refusal to settle. Additionally, Defendant Enumclaw  
10 argues that recognizing Plaintiffs' bad faith claim would require the Court to overrule  
11 established Nevada case law. Defendant Enumclaw further argues that under applicable  
12 case law, Plaintiffs are barred from maintaining a declaratory relief action prior to obtaining  
13 a tort judgment against Defendant Gilman, and thus have not presented a claim ripe for  
14 declaratory relief.

## 15 **II. LEGAL STANDARD**

16 Federal courts hearing cases pursuant to diversity jurisdiction apply federal  
17 procedural law and state substantive law. Gasparini v. Ctr. for Humanities, Inc., 518 U.S.  
18 415, 427 (1996). In considering a motion to dismiss, courts "must construe the complaint in  
19 the light most favorable to the plaintiff and must accept all well-pleaded factual allegations  
20 as true." Saiperas v. Mont. State Comp. Ins. Fund, 480 F.3d 1001, 1003 (9th Cir. 2007)  
21 (quotation omitted). Dismissal of a claim is proper where no cognizable legal theory exists  
22 or where the plaintiff has alleged facts insufficient to support a cognizable legal theory. Id.  
23 Additionally, if the complaint fails to assert facts sufficient to confer standing, dismissal is  
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25 <sup>1</sup> Defendant Enumclaw also requests an award of reasonable attorney's fees and costs incurred.  
26 Defendant Enumclaw did not provide supporting case law for its request, and therefore Defendant  
Enumclaw's request for attorney's fees is hereby denied.

1 proper. Sacks v. Office of Foreign Assets Control, 466 F.3d 764, 771 (9th Cir. 2006).

### 2 **III. DISCUSSION**

#### 3 **A. Bad Faith**

4 State substantive law determines whether Plaintiffs allege facts sufficient to  
5 support a claim of bad faith. Conestoga Servs. Corp. v. Executive Risk Indem., Inc., 312  
6 F.3d 976, 980-81 (9th Cir. 2002). In Nevada, liability for bad faith is strictly tied to the  
7 implied covenant of good faith and fair dealing created by the contractual relationship  
8 between the insured and the insurer. United Fire Ins. Co. v. McClelland, 780 P.2d 193, 197  
9 (Nev. 1989). An insurer's duty to negotiate settlements in good faith arises directly from  
10 the insurance contract. Allstate Ins. Co. v. Miller, 212 P.3d 318, 330 (Nev. 2009).  
11 Therefore, a party who lacks a contractual relationship with an insurer does not have  
12 standing to bring a claim of bad faith. Gunny v. Allstate Ins. Co., 830 P.2d 1335, 1335-36  
13 (Nev. 1992). In Nevada, "[w]here no contract relationship exists, no recovery for bad faith  
14 is allowed." McClelland, 780 P.2d at 197. Other states may recognize a duty to negotiate  
15 in good faith between insurers and third parties, however, Nevada does not recognize such a  
16 duty. Tweet v. Webster, 610 F. Supp. 104, 105 (D. Nev. 1985); see also Bergerud v.  
17 Progressive Cas. Ins., 453 F. Supp. 2d 1241, 1247 (D. Nev. 2006).

18 The Nevada Supreme Court has suggested that in the absence of a contractual  
19 relationship, a third party may have standing to bring a claim of bad faith if it is a specific  
20 intended beneficiary under the policy or has relied to its detriment on actions or  
21 representations made by the insurer. Gunny, 830 P.2d at 1336. Therefore, a contractual  
22 relationship is required to assert a claim of bad faith unless a third party is a specific  
23 intended beneficiary to the insurance contract or alleges it relied to its detriment on

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1 representations made by the insurer. Gunny, 830 P.2d at 1335-36.<sup>2</sup>

2 Plaintiffs' Complaint fails to allege the existence of a contractual relationship  
3 between Plaintiffs and Defendant Enumclaw. Plaintiffs are third party claimants against  
4 Defendant Gilman's insurance policy, and Plaintiffs do not allege they are specific intended  
5 beneficiaries or that they detrimentally relied on representations made by Defendant  
6 Enumclaw. Under Nevada law, Plaintiffs do not have standing to bring a claim of bad faith  
7 against Defendant Enumclaw because they fail to allege the requisite contractual  
8 relationship. The Court therefore, will grant Defendant Enumclaw's Motion to Dismiss  
9 without prejudice as to Plaintiffs' bad faith claim against Defendant Enumclaw.

#### 10 **B. Declaratory Relief**

11 In a diversity action, federal law determines whether the parties have presented a  
12 controversy ripe for judicial review under the Declaratory Judgment Act. Hunt v. State  
13 Farm Mut. Auto. Ins. Co., 655 F. Supp. 284, 286 (D. Nev. 1987). State substantive law  
14 regarding the parties' rights applies when it is relevant to the Court's ripeness analysis. Id.  
15 A federal court may grant declaratory relief "[i]n a case of actual controversy within its  
16 jurisdiction . . . ." 28 U.S.C. § 2201(a). Accordingly, a district court must determine at the  
17 outset whether the parties have presented an actual case or controversy within the court's  
18 jurisdiction. Principal Life Ins. Co. v. Robinson, 394 F.3d 665, 669 (9th Cir. 2005). A case  
19 or controversy is ripe if the court finds "a substantial controversy, between parties having  
20 adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a  
21 declaratory judgment." MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 127 (2007)

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23 <sup>2</sup> Additionally, this Court recognized that Nevada may extend the implied covenant of good  
24 faith and fair dealing to non-contracting parties who are defined as "insureds" under the applicable  
25 policy language. See Bergerud, 453 F. Supp. 2d at 1249. Thus, a non-contracting party who is defined  
26 as an insured under the relevant policy could state a claim against the insurer for bad faith refusal to  
settle. Plaintiffs do not allege they are defined as insureds under Defendant Gilman's insurance policy.  
Therefore, the reasoning in Bergerud is not applicable to the facts of this case.

1 (quotation omitted). Therefore, a court cannot grant declaratory relief if the dispute  
2 between the parties is hypothetical or the rights at issue are merely speculative. Hunt, 655  
3 F. Supp. at 286. The parties must present a dispute that is “definite and concrete.”  
4 MedImmune, 549 U.S. at 127 (quotation omitted).

5 Under Nevada law, declaratory relief between an insured and his insurer may be  
6 granted prior to a final tort judgment. El Capitan Club v. Fireman’s Fund Ins. Co., 506 P.2d  
7 426, 429 (Nev. 1973). Declaratory relief is proper between an insured and his insurer once  
8 the insured has made a demand for the insurance company to pay a claim or defend a  
9 lawsuit. Knittle v. Progressive Cas. Ins. Co., 908 P.2d 724, 726 (Nev. 1996). Additionally,  
10 declaratory relief between an insured and his insurer may be proper where it is clear an  
11 early resolution of the question of coverage will be advantageous to all parties. El Capitan  
12 Club, 506 P.2d at 429.

13 In contrast, under Nevada law, declaratory relief between a third party claimant  
14 and an insurer is proper only after the third party obtains a tort judgment against the  
15 tortfeasor. Knittle, 908 P.2d at 726. The rights of a tort claimant against a tortfeasor’s  
16 insurer do not mature until the tort claimant obtains a judgment against the tortfeasor.  
17 Roberts v. Farmers Ins. Co., 533 P.2d 158, 159 (Nev. 1975). Thus, a plaintiff has “no  
18 legally protectable interest” in an action for declaratory relief until she establishes liability  
19 of the tort defendant. Knittle, 908 P.2d at 725-26. Prior to obtaining a tort judgment  
20 against the tortfeasor, a plaintiff’s rights against the tortfeasor’s insurer are speculative and  
21 not ripe for declaratory relief. Id. at 726.

22 Plaintiffs rely on AAA Nevada Insurance Company v. Chau, to argue their  
23 request for declaratory relief is ripe. No. 2:08-cv-00827-RCJ-LRL, 2010 WL 1756986, at  
24 \*3 (D. Nev. Apr. 30, 2010). In Chau, the insurer initiated a declaratory relief action against  
25 its insured to establish its duties under the insurance contract. Id. at \*1. Third party  
26 claimants against the insurance policy in question moved for permissive intervention in the

1 declaratory relief action between the insured and the insurer. Id. Although the Court  
2 initially dismissed the declaratory relief action, upon reconsideration the Court determined  
3 an actual case or controversy ripe for declaratory relief existed between the insured and the  
4 insurer. Id. at \*2-3. Additionally, the Court reversed prior denial of the third parties'  
5 motion to intervene, allowing intervention pursuant to the Court's discretion under Federal  
6 Rule of Civil Procedure 24(b). Id. at \*5. The Court permitted the third parties to intervene,  
7 even though they could not independently bring a claim against the insurer, because the  
8 third parties had a significant interest in the outcome of the declaratory relief action and  
9 were the only parties in the declaratory relief action with "a truly adverse interest." Id.

10 Plaintiffs rely on Chau to argue that third parties have a justiciable claim for  
11 declaratory relief against a tortfeasor's insurer. Plaintiffs argue that an interest sufficient to  
12 seek permissive intervention in a declaratory relief action between an insured and an insurer  
13 creates a controversy ripe for declaratory relief between a third party and an insurer.  
14 Additionally, Plaintiffs rely on Chau to assert they have a legally protectable interest in the  
15 instant matter because they have an interest in any controversy regarding the liability of  
16 Defendant Enumclaw, the policy limits of Gilman's coverage, and underlying bad faith  
17 claims. Plaintiffs argue their interest in the limits of Gilman's coverage and Enumclaw's  
18 liability for bad faith creates a justiciable controversy ripe for declaratory relief.

19 The declaratory relief action at issue in Chau was between the insured and the  
20 insurer, and the Court found a ripe controversy existed between the insured and the insurer  
21 as to the obligations under the insurance contract. Id. at \*2-3. Consequently, the Court's  
22 decision does not stand for the proposition that actions by third parties against insurers are  
23 ripe for declaratory relief. A court, in its discretion, may grant permissive intervention  
24 under Rule 24(b) where a party lacks standing to assert a claim, whereas a court may not  
25 grant declaratory relief where a party alleges facts insufficient to confer standing. *Perry v.*  
26 *Schwarzenegger*, 630 F.3d 898, 906 (9th Cir. 2011); *MedImmune*, 549 U.S. at 126-27.

1 Therefore, an interest to intervene in a declaratory relief action does not necessarily create a  
2 ripe controversy for a third party to seek declaratory relief. Perry, 630 F.3d at 906. Under  
3 Nevada law, an action between a third party and an insurer is ripe for declaratory relief only  
4 after the third party obtains a tort judgment against the tortfeasor. Knittle, 908 P.2d at 726.  
5 Even assuming Plaintiffs have an interest sufficient to support permissive intervention  
6 under Rule 24(b) in an action between Defendant Gilman and Defendant Enumclaw, they  
7 do not at this time have standing in a justiciable controversy ripe for declaratory relief  
8 against Defendant Enumclaw.

9 Plaintiffs' Complaint fails to allege they have obtained a tort judgment against  
10 Defendant Gilman. Prior to obtaining a tort judgment against Defendant Gilman, Plaintiffs'  
11 rights are speculative as to the liability of Defendant Enumclaw to indemnify Defendant  
12 Gilman for any judgment obtained against him by Plaintiffs. Declaratory relief between  
13 insureds and insurers may be granted prior to the resolution of an underlying tort suit.  
14 However, Plaintiffs do not allege they are an insured party under the contract with  
15 Defendant Enumclaw. Under Nevada law, Plaintiffs do not have a claim against Defendant  
16 Gilman's insurance company until they obtain a final judgment against Defendant Gilman.  
17 The Court cannot grant declaratory relief in the absence of an actual case or controversy.  
18 Therefore, Defendant Enumclaw's Motion to Dismiss is granted without prejudice as to  
19 Plaintiffs' request for declaratory relief.

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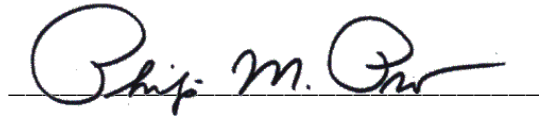
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1 **IV. CONCLUSION**

2 IT IS THEREFORE ORDERED that Defendant Mutual of Enumclaws' Motion  
3 to Dismiss (Doc #11) is hereby GRANTED.

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5 DATED: April 13, 2011

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8 PHILIP M. PRO  
9 United States District Judge  
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